



January 4, 2001

Ms. Elizabeth G. Neally
Roerig, Oliveira & Fisher
855 West Price Road, Suite 9
Brownsville, Texas 78520-8786

OR2001-0019

Dear Ms. Neally:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 142854.

The Brownsville Independent School District (the "district"), which you represent, received a written request for all documents pertaining to the Level I and Level II grievances filed by a certain district employee. You state that the district has released some responsive information to the requestor. You contend, however, that other responsive information is excepted from required public disclosure pursuant to Government Code sections 552.102, 552.114, 552.131, and 552.026 in conjunction with The Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g.

Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.).

The information at issue pertains solely to district employees' actions as public servants, and as such cannot be deemed to be outside the realm of public interest. *See* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Section 552.102 was not intended to protect the type of information at issue here.

You next contend that handwritten statements submitted to the school principal by students constitute confidential records under FERPA. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). When a student has attained the age of eighteen years of age or is attending an institution of postsecondary education, the student holds the rights accorded by Congress to authorize the inspection of these records. *Id.* § 1232g(d).

"Education records" are defined as those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). For purposes of FERPA, the student statements at issue constitute "education records" in that release of students' handwritten comments, even if unsigned, would make the identity of students easily traceable. *See* Open Records Decision No. 224 (1979). Accordingly, the district must withhold all of the student statements you submitted to this office pursuant to FERPA.¹

Although the attorney general will not ordinarily raise an exception that the governmental body has failed to claim, *see* Open Records Decision No. 325 at 1 (1982), we will raise section 552.101 of the Government Code, which protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor. *See* Government Code § 552.352.

We note that among the documents at issue are performance evaluations of an ROTC instructor. Section 21.355 of the Education Code provides that "[a]ny document evaluating the performance of a teacher or administrator is confidential." This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* at 4. Assuming the ROTC instructor held such a

¹Because we resolve this aspect of your request under FERPA, we need not address the applicability of section 552.131 of the Government Code.

certificate or permit at the time of the performance evaluations, we conclude that the evaluations must be withheld from the public in their entirety pursuant to section 21.355 of the Education Code.

We also note that a small portion of the information at issue may be excepted from public disclosure under section 552.117(1) of the Government Code, which requires that the district withhold the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Accordingly, the district must redact the information we have marked, but only if the employee had elected to keep this information confidential in accordance with section 552.024 of the Government Code prior to the district's receipt of the current records request. *See* Open Records Decision No. 530 (1989).

In summary, the district must withhold all handwritten student statements in their entirety pursuant to FERPA. The district must also withhold all teacher evaluations pursuant to section 21.355 of the Education Code. Finally, the district must withhold the marked information protected under section 552.117(1), but only if the employee timely requested confidentiality in accordance with section 552.024 of the Government Code. The district must release all remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one

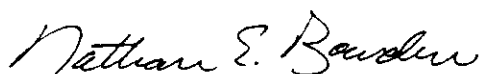
of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/RWP/seg

Ref: ID# 142854

Encl. Submitted documents

cc: Mr. Melrose E. Huff
Brownsville Herald
1135 East Van Buren
Brownsville, Texas 78520
(w/o enclosures)